2013 WL 7122494 (Miss.) (Appellate Brief)
Supreme Court of Mississippi.

Ida M. BLACK, Julia Rosemary Black Burchfield, Kathy Ann Black May, Ivy Darlene Black Waltman, Martha Mildred Black Pruett, Betty Carol Black, Edith Louise Black Coogan, Willard Lee Black, John Wilson Black, Karl Lamar Black, and Karol Addison Black, Appellants,

v.

Jerry M. CLARK, Administrator et al, Appellees.

No. 2012-CA-01223.
January 4, 2013.

Brief of Appellants

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(4) Statement of the Case

Nature of the Case

The case that is before the Court in this appeal arises from the dismissal of a will contest under a Rule 12(b)(6) MRCP motion for failure to state a cause of action. Ida M. Black widow of Ivy M. Black has been joined by her 10 adult children (Blacks) to appeal the Trial Court's ruling. The Blacks contend that the Trial Court erred when it did not strike the 2009 will having found that it did not represent the true intent of Carl Black. Alternatively they pled that the 2009 will was ambiguous and parol evidence should be received as to his true intent. The Trial Court did not strike the 2009 will and ***2** found that the will of Carl Black, brother of her husband, was not ambiguous and that oral testimony was impermissible to show his true intent. Carl Black had sought the services of an **elderly** attorney, James Mayo (Mayo), in Louisville to draw two wills one in 2007 (RE-21) and one in 2009 (RE-23). Both wills devised substantial portions of Carl's estate to his brother. It is the latter will that was attacked because of the negligent failure of Mayo to in include in the 2009 will a clause he put in the 2007 will that preserved the devise to Carl's brother by naming Ida M. Black as alternative devisee and naming her as Executrix of the estate. In the 2009 will Carl again named his brother as Executor but failed to name any alternative executor. Carl Black's brother, Ivy W. Black, died on April 19, 2011 just four days before Carl who died on April 23, 2011 (TR-67). Carl Black's second wife predeceased him and he had no children leaving as heirs at law some 25 nieces and nephews spread throughout the country. Since the 2009 will failed to name an alternative executor Mr. Mayo opened the estate by having the Court name Jerry M. Clark, son of Carl's second wife as Administrator with will annexed. Jerry Clark and his son Shane Clark (Clarks) were substantial devisees under the 2009 will but were not mentioned in the 2007 will. The Blacks contend that the 2009 will was the result ***3** of a scribner's error by Mayo in leaving out the savings clause but also urged on the Trial Court that it should adopt a view that the totality of the circumstances revealed a “latent ambiguity”. This view is novel in Mississippi law and is urged on this Court as well. The Blacks further contend that the Trial Court exercise its inherent equitable jurisdiction to remedy the obvious negligence and malpractice of Mayo. James Mayo suddenly died at the age of 77 years during the course of the proceedings on August 27, 2012 (The Mississippi Lawyer, Vol. LVIV, No. 1, Fall 2012 at page 56)

COURSE OF PROCEEDINGS AND DISPOSITION IN COURT BELOW

On April 27, 2011 Mayo filed the Petition for Letters of Administration with Will Annexed for the 2009 will of Carl Black. He requested that Jerry M. Clark be named Administrator with will annexed since the named executor Ivy W. Black had predeceased the testator. (R-4)

On May 2, 2011 the Court granted the relief sought setting an $80,000 bond. (R-9)

On June 22, 2011 a First Accounting was filed by Mr. Clark. (R-20) It recited, inter alia, $75,323.73 in Carl Black's bank account and the existence of an annuity “amount to be determined”.

***4** On November 28, 2011, Mr. Clark as Administrator and individually along with his son Shane Clark filed in this cause a Complaint for Heirship Determination, Construction of Will, and Other Relief. It named as defendants Ida Mae Black and the heirs at law of Carl Black. (R-23)

On December 28, 2011 Ida M. Black filed her response to the complaint and a Counter Complaint to Contest Last Will and Testament Dated July 11, 2009 naming as defendants all interested parties including the Clarks. (R-48)

On January 6, 2012 Ivy Darlene Waltman filed with the Judge her letter response to the Clark's complaint. The Trial Court turned the letter response over to the Chancery Court Clerk for filing and made it available to the attorneys representing the Clarks and the Blacks. (R-55)

On January 20, 2012 the Clarks filed their Answer to Counter-Complaint. (R-56)

On January 23, 2012 the Blacks requested a continuance so discovery could be undertaken. (R-59) The continuance was granted under an agreed order until May 32, 2012. (R-64)

On February 16, 2012 the Blacks filed a motion to enforce a subpoena that had been issued to Bennie Hill, VP Regions Bank on December 29, 2011 seeking bank records relating to the accounts of Carl Black and the documents ***5** relating to annuities that were sold to him during his lifetime. (R-65) That hearing was held on March 8, 2012 (TR-4)

On March 19, 2012 Mayo made a response to a subpoena duces tecum that had been served on the Clarks and on him personally. (R-74) The documents included a heavily redacted copy of his firm's trust account reflecting the receipt on August 4, 2011 of the sum of $102,491.42 from the annuity. (R-115)

On April 3, 2012 the Blacks, through counsel, wrote Mayo demanding that the annuity funds be transferred from his trust account and be pled into the registry of the Court. (R-168)

On April 12, 2012 an Agreed Judgment Transferring Funds was entered by the Court. (R-121)

On April 19, 2012 Mayo's son John D. Mayo of Meridian entered his appearance to help his father with the case. (R-134)

On May 2, 2012 the Clarks filed their motion under Rule 12 (b)(6), MRCP to Dismiss the Counter Complaint of the Blacks. (R-137) It was noticed for hearing on May 10, 2012. R-140)

On May 10, 2012 the Blacks filed their response to the motion. (R-144)

***6** On May 10, 2012 a hearing was held on the Motion to Dismiss. (TR-27) and the Court issued its bench opinion on that same day dismissing the Counter Complaint of the Blacks. (TR-65)(RE-15)

On May 22, 2012 the Court entered its Judgment Granting the Motion to Dismiss. (RE-13)

On May 22, 2012 a hearing was held for the purpose of determining heirship. (TR-70)

On May 29, 2012 the Blacks filed their Motion for a New Trial and/or Reconsideration. (R-153)

On June 14, 2012 a hearing was held on the Motion for a New Trial and/or for Reconsideration. (TR-115) The Court entered its bench opinion that same day overruling the motion. (RE-5)

On June 27, 2012 the Court entered its Order Overruling Motion for New Trial/Reconsideration. (R-171)(RE-4)

On July 24, 2012 the Blacks filed their Notice of Appeal. (R-178)

STATEMENT OF FACTS

In June of 2007 Carl Black a resident of Winston County consulted an attorney James Mayo of Louisville and had a will prepared and executed. (RE-21) The 2007 will provided that all of his property was to go to his brother ***7** Ivy W. Black and named him Executor of the estate. The will prepared by Mr. Mayo in 2007 further provided that in the event his brother predeceased Carl his brother's widow, Ida M. Black would inherit his bequest and would serve as the alternate Executrix. At the time of the first will Carl Black was 85 and his brother Ivy Black was 81 (R-104,105)

In 2009 Carl Black returned to James Mayo to revise his will. The will, which was executed on July 16, 2009, provided again that Carl's residence would be devised to his brother Ivy but that an old store site would be devised to his "step-son" Jerry Michael Clark and his "step-grandson" Shane Michael Clark. The will further provided that the residual estate was to be divided between Ivy, Michael and Shane "share and share alike". The will again named Ivy Black as the Executor. However, this time James Mayo forgot to add the savings clause included in the 2007 will in favor of Ivy's widow and named no alternative executor.

Carl Black's brother, Ivy W. Black, died on April 19, 2011 just four days before Carl who died on April 23, 2011 (TR-67). Carl Black's second wife predeceased him and he had no children leaving as heirs at law some 25 nieces and nephews spread throughout the country. (TR-70).

***8** By the time of the second will James Mayo had reached the age of 74 and he suddenly died during the course of these proceedings on August 28, 2012. (The Mississippi Lawyer, Vol. LVIV, No. 1, Fall 2012 at page 56)

The 2009 will was not the first time Mr. Mayo committed serious malpractice against his client Carl Black by omitting a crucial clause in a document. In 2005 at the time of the first will attorney Mayo drew up a deed for Carl Black to convey all of his real property, including the residence he was living in, to his brother Ivy Black and "his heirs and assigns". (R-165) Mr. Mayo in drawing the deed forgot to reserve a life estate in Carl Black and consequently the deed messed up Carl's homestead and tax exemptions.

Before his son entered his appearance to assist his father in the case Mr. Mayo evidenced unusual behavior at the hearing on the motion to enforce the subpoena against the Regions Bank. (TR-4) The hearing revealed that no estate account had been opened for the Carl Black estate and that his regular checking account did not contain any payment of the $100,000.00 plus annuity. Mr. Mayo was asked in open court to reveal, as an officer of the court, where the annuity proceeds were being held. He refused to reveal ***9** where the annuity proceeds were being held without a formal discovery request. (TR-25)

The hearing on the subpoena also revealed that as late as July of 2010, when he was applying for the annuity, Carl Black expressed a desire to leave his estate to his brother Ivy Black. (TR-17)

Mr. Mayo responded to his subpoena on March 19, 2012. (R-74) and revealed that he had received the annuity proceeds on August 4, 2011 in the amount of $102,491.42. He had in fact deposited this sum in his trust account. There was no explanation as to why he had put the funds in his trust account. He had not reported this to the Court and had not amended the inventory nor had he sought to increase the amount of the bond even though the liquid funds belonging to the estate had more than doubled to $175,000.00. This led the Clarks to demand that the funds be pled into the registry of the court. (R-168) This was accomplished by an agreed order on April 12, 2011. (R-121)

On the morning of the hearing on the Motion to Dismiss Mr. Mayo faxes a copy of his answers to the interrogatories and request for production that had been served on the Clarks. (TR-46) The answers which are unsworn are signed by Mr. Mayo. (R-160) They reveal that Mr. Mayo had adopted some very strange practices in his later years. He had ***10** stopped maintaining client files or at least he claimed he had no client files on Carl Black (R-163, Request No. 4) He also stonewalled on the Interrogatory seeking facts to support the contention that Carl Black intended for his bequest to his brother to lapse and not pass to his brother's widow as it did in the 2007 will. (R-162, Interrogatory No. 5)

The discovery responses do validate the allegations contained in the letter pleading that Mrs. Ivy D. Waltman filed with the Court in December of 2011. (R-167) While these are not strictly facts they do show that three witnesses were prepared to testify that shortly after the death of Carl Black they went to the office of James Mayo and found him "confused and a bit disoriented in his own office." He stated he did not keep copies of wills and was at first unable to find anything on Carl Black as his files were not alphabetical. They could find no copy of the 2007 will in the office although they did eventually find the 2009 will.

The Trial Court found the will to be unambiguous and dismissed the Counter Complaint of the will contest and refused to grant any form of relief to the Blacks on rehearing. (RE-4,13)

(5) Summary of the Argument

***11** Although the Trial Court found that the 2009 will did not represent the true intentions of Carl Black it did not dismiss the will as requested in the Counter-Complaint of the Blacks. The Trial Court having found the 2009 will did represent the intentions of Carl Black was in error in finding the 2009 will of Carl Black was not ambiguous, either patently or latently, as requested in the alternative relief under the Counter-Complaint and the Trial Court **abused** its discretion in not granting any equitable relief to the Blacks under the circumstances of this case which include the gross malpractice of Mr. Mayo.

(6) Argument

The irony of this appeal is that the Trial Court succinctly articulated the serious conundrum that overhangs this case and justifies either the dismissal of the 2009 will or at least a further inquiry to determine the true intent of Carl Black. Whether you call it a patent or latent ambiguity of whether you put it under the inherent jurisdiction of equity as the conscience of the law. The Trial Court apparently felt because it (or more properly I) could not find a Mississippi case directly on point it was powerless. That is why our system provided for appeal courts.

***12** In the Trial Court's Bench Opinion on the Motion for a New Trial/Rehearing it articulated its finding on the 2009 will and deep concern as follows:
"The big question I have in this case - the most disturbing part of it to me is we've got a partial intestacy. **Everybody can agree that Mr. Black didn't want to die intestate.**

He went to the trouble of contacting a lawyer and getting a will drawn. Came along a couple of years later and made a change to his will, which none of that is unusual.

He certainly didn't want to die intestate. And we've got a significant intestacy." (RE-5)(emphasis supplied)

"...I couldn't find any case law that says when you have - don't provide for some sort of anti-lapse provision in a will that that makes it invalid. **I recognize that's not what he wanted.**" (RE-6)(emphasis supplied)

I. DID THE TRIAL COURT ERR WHEN IT DID NOT STRIKE THE 2009 WILL OF CARL BLACK HAVING FOUND THAT IT DID NOT REPRESENT THE INTENT OF CARL BLACK.

No one at the reconsideration hearing disputed the Court's finding that 2009 will did not represent the testamentary intent of Carl Black and the Clarks have not cross appealed. Mr. Mayo, if he had evidence that this was the intent of Carl Black, took it to the grave with him having refused to answer an interrogatory on just this point and having no client file on the 2009 will.

"In the final analysis, there is only one issue in a will contest, and that is whether the subject writing is ***13** the valid will of the deceased. This is the issue devisavit vel non-will or no will."... "Many requirements must be met if the will is to be

held to be a valid will. The decedent must have intended to make a will **and the writing must have given expression to that intent..."** Weems, Wills and Administration of Estates in Mississippi, 3d Ed., Sec. 8:5 at page 182, 183. (emphasis supplied) A will that does not express the testamentary intent of the testator, as the Trial Court found in connection with Carl Black's 2009 will cannot stand as a valid will. In re George's Estate, 45 So. 2d 751 (Miss. 1950)

II. DID THE TRIAL COURT ERR WHEN IT FAILED TO FIND THE 2009 WILL OF CARL BLACK WAS AMBIGUOUS ON ITS FACE.

III. DID THE TRIAL COURT ERR WHEN IT FAILED TO FIND THAT THE TOTALLITY OF THE CIRCUMSTANCES REVEALED A LATENT AMBIGUITY IN THE 2009 WILL OF CARL BLACK.

At a very minimum a will that does not reflect the testamentary intent of the testator is ambiguous by definition as to the intent of that testator. In their request for alternative relief set forth in their Counter-Complaint the Blacks requested that "any proper construction of the 2009 will requires that it be considered as containing the necessary language, left out by the scrivener, causing the devises to Ivy W. Black to ***14** survive to his widow Ida M. Black and naming her Executrix." (R-51)

"This Court has long recognized that parol evidence is admissible to show the surrounding circumstances where **that is necessary to establish the testator's true intent.**" *Ross v. Brasell, 511 So. 2d 492, 495 (Miss.1987).* The Ross Case cites with approval the case of Strickland v. Delta Inv. Co. 163 Miss. 772, 137 So. 734 (Miss. 1931). In that case the Supreme Court held the Chancellor erred in refusing to hear parol evidence in a residuary clause remarkably similar to the case at bar. "...but if on examination of the entire will, **the meaning of the testator is doubtful,** the facts and circumstances surrounding the testator at the time of the making of the will, and his relation to the parties in interest will be looked to..." Strickland, supra. 163 Miss at 781 (Emphasis supplied).

This is true whether we are dealing with patent ambiguities as we are in most Mississippi reported cases or this Court should recognize the principles of the doctrine of "latent ambiguities" as recognized in other jurisdictions. "A latent ambiguity, contra distinguished from a patent ambiguity, can only be developed by extrinsic and collateral circumstances." *Logan v. Wiley,* 55 A. 2d. 366, 367 (Pa. 1947). The Blacks urged this principle on the ***15** Trial Court (TR-134) and it urges the principles of "Latent Ambiguities" on this Court as a way to make clear that the Courts in will contests can examine extrinsic and collateral circumstances to identify ambiguities. Just like the Chancery jurisdictions have historically addressed statutes of frauds, which on their face are harsh and unrelenting, by developing exceptions which enable a court of equity to seek justice.

IV. DID THE TRIAL COURT ABUSE ITS DISCRETION WHEN IT FAILED TO EXERCISE ITS INHERENT EQUITY JURISDICTION AND OTHER TOOLS TO CORRECT AND REMEDY OBVIOUS MALPRACTICE AND ERRORS OF THE ELDERLY ATTORNEY WHO DRAFTED THE 2009 WILL OF CARL BLACK.

And now we come to the most difficult and personally distasteful part of this appeal. I have known and practiced against James C. Mayo since I started in 1969. One might truthfully say I am getting to be an "**elderly**" attorney. I can only hope and pray that members of my family or my friends intervene before I have practiced too long and particularly before I have done the kind of damage James Mayo visited on the Black family. There is no way to whitewash this so I won't.

A study of the record of the hearings and Mr. Mayo's responses to the discovery raises some difficult issues as to the credibility and competence of James Mayo the drafter of the wills and other documents of his client Carl Black. ***16** One of the responses admits the relevance of a deed from Carl Black to Ivy W. Black drafted by James Mayo. The deed which was executed on the same day as the 2007 will conveyed all of Mr. Carl Black's home and other real property to his brother Ivy W. Black and "his heirs and assigns". All lawyers have prepared such deeds and I am sure Mr. Mayo in his long legal career has prepared many such deeds, however this deed neglects to reserve a life estate in Carl Black thereby destroying his homestead exemption. The property had to be conveyed back to Carl Black to preserve his homestead exemption. This was gross incompetence on the part of James Mayo. James Mayo's incompetence continued when he was asked to draw another will for his client in 2009. The

2007 will contained a savings clause in favor of his brother's widow Ida should the brother die first. The 2009 will forgets to include this clause and forgets to provide for an alternative Executor as the 2007 will did.

The responses to the discovery stonewall questions about any facts that support the omission of the savings clause. Perhaps Mr. Mayo has no memory about these events in 2009 but the most damming revelation in the responses is his contention that he has no client files for his client Carl Black. His response does match the letter pleadings ***17** filed by Ivy Darlene Waltman on December 20, 2011. She relates in her pleading a trip to Mr. Mayo's office shortly after the death of Carl Black as follows: "It would be an understatement to tell you how shocked I was trying to deal with Mr. Mayo. After showing him the 2007 Will and explaining to him the deaths of both my father and my uncle, he did not seem to grasp what I was talking about. He seemed confused and a bit disoriented in his own office. Not knowing about the 2009 will, my mother tried to tell Mr. Mayo that there should be a Codicil (sic.) in my uncle's file. To my astonishment, Mr. Mayo stated he did not keep copies of Wills because originals must be produced for recording. Upon my insistence, Mr. Mayo did attempt to locate the file in his office but was not able to since his filing system was not in alphabetical order. My brother offered to help and was able to locate my uncle's file. We were all surprised to learn that instead of a Codicil (sic.) to the 2007 Will, there was a new Will prepared on 7/16/09...and yes, there was a copy in the file to which Mr. Mayo was very surprised to find. But there was no copy of the 2007 Will in the file."

"...It is my contention that Mr. Mayo showed gross negligence and incompetence in this matter. You might ask why my father and uncle didn't remind Mr. Mayo of the earlier Will, but you must understand that these were two old men counting on the expertise of an attorney."

While Mrs. Waltman's testimony would support her mother's position in this matter it would be against interest as she is one of the heir's at law of Carl Black and currently stands to benefit directly from the Trial Court's current ruling. She has also joined in this appeal to support her mother's position.

Other matters apparent in this record reflecting on Mr. Mayo's competence in handling this estate include the following: 1. Mr. Mayo never opened an estate account ***18** although Carl Black's estate was extremely liquid and had in excess of $75,000.00 in his regular checking account. 2. He failed to report to the Court the receipt of in excess of $100,000.00 in annuity proceeds and kept those funds in his trust account until forced to interplead them into the registry of the Court. He declined to tell the Court, as an officer of the Court, where these annuity funds were being held without formal discovery. He was later forced to put all the monies into the registry of the Court.

A review of the heirship hearing which he attempted to handle on his own was a farce. (TR-70) He arrived with no witness prepared to go forward with testimony as to the heirship of Carl Black. The Clarks knew nothing of the heirship of the family they had only fairly recently joined through Carl's second wife. After he threatened to put Ida M. Black on as an adverse witness, a studied cruelty since the motion to dismiss had just knocked her out of her interest, the Blacks agreed to meet to see what we could stipulate. There were areas of the extended family The Blacks knew nothing about but some of those people had showed up to get their windfall and their own testimony on their own lineage had to do.

The Blacks asked the Trial Court to exercise its historic role to keep the common law from creating ***19** injustice. Equity has always been a forum for seeking to soften the sometimes harsh edges of traditional common law.

Courts of Equity were originally created or evolved to remedy the constraints and inefficiencies of common law. Shelson, Mississippi Chancery Practice, Sec. 7-10 (2011) "Judgments in equity act upon the person and **enforce the dictates of judicial conscience,** as compared with the sometimes ineffective judgment at law for a fixed recovery. This is still the master key to the efficiency of equity." Supra, Sec. 10, Page 6 (emphasis supplied).

In this regard the Blacks also invoked in the lower court the principles behind Rule 60(b) (6), MRCP. While not a final judgment at that time the principles behind the rule was to grant to all courts the inherent power to take action for "any other reason justifying relief from the judgment". (TR-124)

It is the Blacks position both in the Trial Court and here that it is the responsibility of both the bar, its members and the judicial system to police itself and when it becomes obvious that one of its members has caused great harm by his malpractice or misfeasance it becomes the duty of the judicial system to correct that injury at the point of its origin utilizing all the tools available. If this is a request for new law so be it. This new efficiency would ***20** be appreciated by the public and would go a long way to restore confidence in the professional bar and the Court system.

CONCLUSION

It is respectfully submitted that the Trial Court correctly found that the 2009 will of Carl Black did not represent his true testamentary intent but then erred by failing to strike it as not constituting the valid will of Mr. Black or alternatively erred when it failed to find that such a will, either patently or latently, was ambiguous as to the intent of Carl Black and allow parol testimony as to the intent of Mr. Black.

It is further submitted that the Trial Court **abused** its discretion when it failed to efficiently utilize its inherent equitable powers and other tools at its disposal to remedy injustice at the point of injury when it became obvious that one of the members of the professional bar has caused great harm by his malpractice or misfeasance.

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